

1 THE HONORABLE ROBERT J. BRYAN
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 TIMOTHY DIETZ,) No. 13-05948-RJB
11 v.) Plaintiff,)
12 QUALITY LOAN SERVICE CORP. OF)
13 WASHINGTON; WELLS FARGO HOME)
14 MORTGAGE; WELLS FARGO BANK,)
15 N.A.; MORTGAGE ELECTRONIC)
16 REGISTRATION SYSTEMS, INC.;)
17 MERSCORP, INC.; McCARTHY &)
HOLTHUS LLP; DOE DEFENDANTS 1-20,)
Defendants.)

)

WELLS FARGO AND MERS'S
MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED
COMPLAINT
NOTE ON MOTION CALENDAR:
MARCH 21, 2014

18 **I. INTRODUCTION AND RELIEF REQUESTED**

19 Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants Wells Fargo and MERS respectfully
20 request that the Court dismiss with prejudice the claims Plaintiff Timothy Dietz has asserted
21 against them in his Second Amended Complaint ("SAC"). ECF No. 20.¹

22 This is a post-sale "wrongful foreclosure" case. Dietz filed this lawsuit on October 30,
23 2013. On January 3, 2014, the Court granted Wells Fargo and MERS's Motion to Dismiss and
24 dismissed those defendants from the lawsuit without prejudice. Dietz then filed multiple
25

26 ¹ "Wells Fargo" is, collectively, Defendant Wells Fargo Home Mortgage and Defendant Wells Fargo Bank, N.A.
27 "MERS" is collectively Defendant Mortgage Electronic Registration Systems, Inc. and Defendant MERSCORP,
Inc.

"Dietz" is Plaintiff Timothy Dietz.

1 amended complaints with the Court ruling that the SAC is the operative complaint.

2 Dietz's SAC does not cure the deficiencies of his original Complaint. Dietz's causes of
 3 action for violation of the FDCPA and the DTA still fail to state a claim against Wells Fargo or
 4 MERS and these claims should now be dismissed with prejudice. Dietz's newly pled claims for
 5 breach of contract and conspiracy of fraud (sic) are not pled with specificity and nevertheless
 6 fail to state a claim upon which relief can be granted.

7 Despite filing two amended complaints, Dietz still cannot state a claim against Wells
 8 Fargo or MERS. Accordingly, Dietz's claims against these defendants should be dismissed
 9 with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

10 **II. FACTS**

11 On September 26, 2008, Dietz consummated a loan (the "Loan") by executing a
 12 promissory Note (the "Note") for \$192,375.00 with Hyperion Capital Group, L.L.C. ("HCG")
 13 as the lender. SAC ¶ 15, ECF No. 20.

14 On September 26, 2008, Dietz executed a Deed of Trust (the "DOT") naming HCG as
 15 the lender and securing property commonly known as 2503 34th Ave, Longview, Cowlitz
 16 County, Washington, 98632 (the "Property") as security for the Loan. *Id.* at ¶ 20. The DOT
 17 was recorded in the records of Cowlitz County on October 3, 2008, under Recording Number
 18 3378077. *Id.* The Property is Dietz's primary residence. *Id.*

19 By letter dated March 20, 2013, Wells Fargo advised Dietz that it purchased his Loan
 20 from HCG "after closing." Letter, ECF No. 19-6 at 2. Dietz has attached a Wells Fargo
 21 Consumer Account Activity Statement ("CAAS") showing that Wells Fargo has been receiving
 22 his Loan payments since at least December 2009. CAAS, ECF No. 19-1 at 5. The CAAS also
 23 shows that, as of December 2009, Dietz was making payments on the Loan and there were no
 24 outstanding balances on the Loan. *Id.*

25 Dietz also attaches a validation of debt from Defendant Quality Loan Service Corp. of
 26 Washington ("QLS"). ECF No. 18-3 at 9-14. The validation states that Dietz's Loan is in
 27 default as a result of "Failure to make the 12/1/2010 payment[.]" *Id.* at ECF No. 18-3 at 11.

1 On or about May 17, 2011, America's Servicing Company, a division of Wells Fargo,
 2 recorded an assignment (the "Assignment") of the DOT to Wells Fargo in the county records.
 3 Assignment, Ex. B to Lorber Decl., ECF No. 7.

4 After recording the Assignment, Wells Fargo recorded a second Assignment in the
 5 county records. 2nd Assignment, Ex. C to Lorber Decl., ECF No. 7. The Assignment and 2nd
 6 Assignment are functionally identical: they were both recorded by Wells Fargo entities, they
 7 were both executed by MERS representatives, and they both assigned MERS's record agency
 8 interest in the DOT to Wells Fargo and gave public notice that Wells Fargo was the successor
 9 beneficiary of the DOT. *Compare* Exs. B and C to Lorber Decl., ECF No. 7.

10 On February 21, 2012, Wells Fargo recorded an appointment of successor trustee (the
 11 "Appointment"), naming Defendant Quality Loan Service Corp. of Washington ("QLS") as
 12 successor trustee of the DOT. Appointment, Ex. D to Lorber Decl., ECF No. 7.

13 On August 29, 2012, QLS recorded a notice of trustee's sale (the "1st Notice of Sale")
 14 against the Property. 1st Notice of Sale, Ex. E to Lorber Decl., ECF No. 7. The 1st Notice of
 15 Sale states, on its face, that Dietz was \$23,887.12 behind on the Loan at the time it was
 16 executed. *Id.* at ¶ III. On October 17, 2012, QLS discontinued the 1st Notice of Sale via a
 17 recorded notice. Discontinuance, Ex. F to Lorber Decl., ECF No. 7.

18 On October 17, 2012, QLS recorded a second notice of trustee's sale (the "2nd Notice of
 19 Sale"), scheduling a non-judicial foreclosure of the Property for February 13, 2013. 2nd Notice
 20 of Sale, Ex. G to Lorber Decl., ECF No. 7.

21 The sale was postponed several times and the 2nd Notice of Sale eventually expired
 22 without a sale taking place. SAC. ¶ 157, ECF No. 20. On May 21, 2013, QLS recorded a new
 23 notice of sale (the "3rd Notice of Sale") scheduling a non-judicial foreclosure sale of the
 24 Property for September 20, 2013. 3rd Notice of Sale, Ex. H to Lorber Decl., ECF No. 7. The
 25 3rd Notice of Sale states, on its face, that Dietz was \$33,456.86 behind on the Loan at the time it
 26 was executed. *Id.* at ¶ III. The 3rd Notice of Sale also states that Dietz had been in default for
 27 almost three years. *Id.* at ¶ IV (stating interest was due on the Note from December 1, 2010).

1 QLS sold the Property on September 20, 2013 and the Property reverted to Wells Fargo.
 2 Trustee's Deed, Ex. I to Lorber Decl., ECF No. 7.

3 Dietz did not file a motion to restrain the sale in either this Court or Cowlitz County
 4 Superior Court before the sale occurred.²

5 On January 3, 2014, the Court granted Wells Fargo and MERS's Motion to Dismiss and
 6 dismissed Wells Fargo and MERS from this lawsuit without prejudice. ECF No. 15. Dietz
 7 filed an amended complaint on February 7, 2014 and the SAC on February 10, 2014. ECF
 8 Nos. 18, 20. On February 11, 2014, the Court confirmed that the SAC is the operative
 9 complaint. ECF No. 21.

10 **III. EVIDENCE RELIED UPON**

11 This motion relies on the allegations in Dietz's SAC, the recorded documents attached
 12 as Exhibits to the Lorber Declaration of which the Court may take judicial notice, and the other
 13 pleadings and papers on file with the Court in this matter.³

14 **IV. ISSUE**

15 Should Dietz's SAC be dismissed with prejudice because it fails to state a claim upon
 16 which relief can be granted?

17 **V. ARGUMENT**

18 **A. Motion to Dismiss Standard**

19 This Court has recently articulated the Fed. R. Civ. P. 12(b) standard:

20 Fed.R.Civ.P. 12(b)(6) motions to dismiss may be based on either the lack of a
 21 cognizable legal theory or the absence of sufficient facts alleged under a
 22 cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696,
 699 (9th Cir.1990). Material allegations are taken as admitted and the complaint
 23 is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th

24 ² See search for cases in Cowlitz County Superior Court filed in or after 2010 including parties named "Dietz, T,"
<http://dw.courts.wa.gov/index.cfm?fa=home.superiorsearch&terms=accept>, accessed Nov. 13, 2013.

25 ³ The Court may take judicial notice of publicly recorded documents and may consider the documents without
 26 turning this motion into a motion for summary judgment. See, e.g., *Shaw v. Hahn*, 56 F.3d 1128, 1129 n. 1 (9th
 27 Cir. 1995); See *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (court may consider documents to
 which the complaint "refers extensively" or "form the basis of the plaintiffs' claim"); *Parrino v. FHP, Inc.*, 146
 F.3d 669, 707 (9th Cir. 1998) ("A court may consider evidence on which the complaint 'necessarily relies' if: (1)
 the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions
 the authenticity of the copy attached to the 12(b)(6) motion.").

1 Cir.1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss
 2 does not need detailed factual allegations, a plaintiff’s obligation to provide the
 3 grounds of his entitlement to relief requires more than labels and conclusions,
 4 and a formulaic recitation of the elements of a cause of action will not do.” *Bell*
5 Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d
6 929 (2007) (internal citations omitted). “Factual allegations must be enough to
7 raise a right to relief above the speculative level, on the assumption that all the
8 allegations in the complaint are true (even if doubtful in fact).” *Id.* at 1965.
9 Plaintiffs must allege “enough facts to state a claim to relief that is plausible on
10 its face.” *Id.* at 1974.

11 * * *

12 In assessing whether a case should be dismissed with prejudice and without
 13 leave to amend, five factors should be considered: “(1) bad faith; (2) undue
 14 delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5)
 15 whether the plaintiff has previously amended his complaint.” *Nunes v. Ashcroft*,
16 375 F.3d 805, 808 (9th Cir.2004) (citing *Bonin v. Calderon*, 59 F.3d 815, 845
17 (9th Cir.1995)). “Futility alone can justify the denial of a motion for leave to
18 amend.” *Id.*

19 *Call v. Routh Crabtree Olsen, P.S.*, Case No. 13-5241 RJB, 2013 WL 3805651, * 4, 6 (July 18,
 20 2013) (dismissing case with prejudice and without leave to amend).

21 This lawsuit should be dismissed with prejudice and without leave to amend against
 22 Wells Fargo and MERS because Dietz has amended the Complaint two times and his claims
 23 still fail.

24 **B. Dietz Fails to State a Claim for Relief for Violation of the FDCPA.**⁴

25 Dietz’s first cause of action is for violation of the Fair Debt Collection Practices Act
 26 (“FDCPA”), 15 U.S.C. § 1692. SAC, ECF No. 20-1 at 10. In its Order Granting Wells Fargo
 27 and MERS’s Motion to Dismiss, the Court accepted Wells Fargo’s argument that it was not a
 “debt collector” under the FDCPA and thus could not be liable for violations of the same. ECF
 No. 15 at 6-7. The Court noted Dietz’s contention that the Loan was in default at the time of
 assignment to Wells Fargo, but found that the “undisputed facts, however, indicate that Wells
 Fargo purchased the loan in 2008, prior to Dietz’s default.” *Id.* at 7. The Court also held that
 Dietz’s claim that Wells Fargo failed to notify him that it purchased the Loan was barred by the
 statute of limitations. *Id.* Finally, the Court held that Dietz’s FDCPA claims failed because

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1 “Claims based on foreclosure activities are not cognizable under the FDCPA.” *Id.*

2 Dietz’s SAC fails to cure the deficiencies of the original Complaint: Wells Fargo is not a
 3 “debt collector” under the Act. Indeed the documents Dietz has submitted to the Court show
 4 the following:

- 5 • Wells Fargo purchased the Loan in 2008 after origination (ECF No. 19-6 at 2);
- 6 • Wells Fargo has been receiving payments on the Loan since at least December 2009
 (ECF No. 19-1 at 5);
- 7 • There was no past due balance under the Loan in December 2009 (*id.*);
- 8 • Dietz defaulted on the Loan in December 2010 (ECF No. 18-3 at 11).

9 Under these factual allegations, Wells Fargo is not a “debt collector” as defined by the
 10 FDCPA because it was the successor lender/ servicer of Dietz’s Loan. *Perry v. Stewart Title*
 11 *Co.* 756 F.2d 1197, 1208 (5th Cir. 1985). Therefore the FDCPA claim should be dismissed
 12 with prejudice.

13 **C. Dietz Fails to State a Claim Against Wells Fargo or MERS for Violation of the**
 14 **DTA.**

15 Dietz’s second cause of action alleges violation of the Washington Deed of Trust Act
 16 (“DTA”), RCW 61.24 et seq. SAC, ECF No. 20-1 at 14. As in the original Complaint, the
 17 DTA claim is not directed at Well Fargo or MERS. As this claim has already been dismissed
 18 against these defendants and is not reasserted against them in the SAC, Dietz’s amended DTA
 19 claim is insufficient to keep Wells Fargo and MERS in this suit. *See Order*, ECF No. 15 at 8
 20 (“Post-sale claims under the DTA are confined to claims that allege ‘failure of the trustee to
 21 materially comply with the provisions of this chapter.’ RCW 61.24.127(1)(c). Neither Wells
 22 Fargo nor MERS is a trustee of the deed of trust. The DTA claims against Wells Fargo and
 23 MERS are subject to dismissal.”).

1 **D. Dietz Fails to State a Claim Against Wells Fargo for Breach of Contract.**

2 Dietz third cause of action alleges breach of contract. SAC, ECF No. 20-1 at 15. Dietz
 3 claims that Wells Fargo breached the DOT contract by failing to comply with Department of
 4 Housing and Urban Development (“HUD”) regulations that affect the DOT. SAC ¶ 210-11,
 5 ECF No. 20-1.

6 To state a claim for breach of contract, a plaintiff must allege (1) the existence of a valid
 7 contract between the parties, (2) breach by the defendant, and (3) damages. *Lehrer v. State*
 8 *Dep’t of Social & Health Servs.*, 101 Wash. App. 509, 516, 5 P.3d 722 (2000). Dietz’s breach
 9 of contract claim fails for multiple reasons.

10 First, Dietz fails to specify which HUD regulations with which Wells Fargo failed to
 11 comply and, without such specific allegations, the SAC does not meet the Fed. R. Civ. P. 8(a)
 12 or 12(b)(6) standard. *See Bardy v. Cardiac Science Corp.*, Case No. C13-0778JLR, 2014 WL
 13 294526, *5 (W.D. Wash. Jan. 27, 2014) (dismissing breach of contract claim where essential
 14 element of damages was pled by “naked assertion” and “without factual enhancement.”).⁵

15 Second, as with the DTA claims, any pre-sale breach of contract claims are barred by
 16 the *Brown* waiver doctrine and RCW 61.24.127. *See* Order, ECF No. 15 at 8.

17 Third, Dietz’s breach of contract claim fails because he cannot satisfy the element of
 18 damages. Dietz claims he was damaged by “the sale of Mr. Dietz’s property.” SAC ¶ 212,
 19 ECF No. 20-1. However, Dietz admits taking out the Loan, signing the DOT, and defaulting on
 20 his Loan payments. SAC ¶¶ 15, 20, 28, ECF No. 20. To the extent that the sale of the Property
 21 damaged Dietz, such damage was caused by his own default on the Loan, not by any breach
 22 committed by Wells Fargo. Dietz has not (and cannot) allege any damages flowing from Wells
 23 Fargo’s alleged breach of the DOT and so his third cause of action should be dismissed with
 24 prejudice.

25
 26 ⁵ Dietz cites to 24 U.S.C. § 203.604 for the proposition that a lender must arrange a face-to-face
 27 meeting with a borrower before foreclosing. SAC ¶ 77, ECF No. 20. Title 24 of the U.S.C.,
 however, deals with hospitals and asylums and has nothing to do with residential mortgages.

1 **E. Dietz Fails to State a Claim for Fraud.**

2 Dietz's fourth cause of action alleges fraud. SAC, ECF No. 20-1 at 16. The essence of
 3 Dietz's claim is that all defendants committed fraud by including MERS in the Loan
 4 transaction. *See id.* This claim fails because Dietz fails to plead fraud with necessary
 5 specificity.

6 Fed. R. Civ. P. 9(b) imposes a heightened pleading standard for parties alleging fraud,
 7 requiring that they "state with particularity the circumstances constituting fraud." *See Swartz v.*
 8 *KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Each of nine elements must be established to
 9 prevail on a claim for fraud under Washington law:

10 (1) Representation of an existing fact; (2) materiality; (3) falsity; (4) the
 11 speaker's knowledge of its falsity; (5) intent of the speaker that it should be
 12 acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's
 13 reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and
 14 (9) damages suffered by the plaintiff.

15 *Stiley v. Block*, 130 Wash.2d 486, 505, 925 P.2d 1984 (1996).

16 The mere inclusion of MERS in a loan transaction is not actionable under Washington
 17 law. *Bain v. Metro. Mtg. Gp., Inc.*, 175 Wash.2d 83, 120, 285 P.3d 34 (2012). The mere
 18 inclusion of MERS in a loan transaction also does not support a fraud claim where the plaintiff
 19 does not allege each element of fraud with particularity. *See Babrauskas v. Paramount Equity*
 20 *Mtg.*, Case No. C13-0494 RSL, 2013 WL 5743903, *5 (W.D. Wash. Oct. 23, 2013) (Granting
 21 motion to dismiss fraud claims based on MERS identification as beneficiary in deed of trust
 22 where "plaintiff has not alleged that he relied on that representation (as opposed to relying on
 23 subsequent holders' and servicer's representations that they had the right to collect payments on
 24 the note) or that he suffered damages caused by MERS' misrepresentation."); *Wilson v. Bank of*
 25 *America, N.A.*, Case No. No. C12-1532JLR, 2013 WL 275018, *5 (W.D. Wash. Jan. 24, 2013)
 26 (same).

27 Dietz's allegations regarding the MERS "conspiracy of fraud" simply fails to state a
 28 claim under Fed. R. Civ. P. 9(b). Importantly, there is no identification of a specific statement
 29 or fact made by Wells Fargo or MERS that Dietz relied on to his detriment. To the extent

1 Dietz's claims are premised on MERS's identification as "beneficiary" in the DOT, Dietz fails
 2 to allege how he was injured by such identification. Indeed, Dietz admits signing for the Loan,
 3 he does not dispute receiving the benefit of the Loan, and he possessed the Property pursuant to
 4 the Loan since the time of origination. SAC ¶¶ 15, 20, ECF No. 20. Under these alleged facts
 5 there are no damages caused by detrimental reliance and so the fraud claim fails as a matter of
 6 law.

7 The allegations in the SAC, even if true, do not support a claim for fraud against Wells
 8 Fargo and MERS. This claim should therefore be dismissed with prejudice.

9 **VI. CONCLUSION**

10 The SAC represents Dietz's third attempt to state a claim against Wells Fargo or MERS.
 11 Despite multiple opportunities, Dietz still cannot state a cognizable claim against these
 12 defendants. For the foregoing reasons, Dietz's claims against Wells Fargo and MERS should
 13 be dismissed with prejudice.

14 DATED: February 24, 2014.

15 LANE POWELL PC

16
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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I caused the foregoing document to be filed with the Clerk of the Court via the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following persons:

Timothy Dietz
2503 34th Ave
Longview WA 98632
timthepostman@yahoo.com

I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

SIGNED February 24, 2014 at Seattle, Washington

/s/Patricia King
Patricia King